TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 61

JOHN SLAKER, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF JOHN O'CONNOR, DECEASED, APPELLANT,

vs.

CHARLES O'CONNOR, EDWARD O'CONNOR, MARY L. O'CONNOR, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED FEBRUARY 4, 1928

(33,197)

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(Petition.)

In The District Court Of The United States, District Of Nebraska, Hastings Division.

Charles O'Connor, Edward O'Connor, Mary L. O'Connor, P. S. O'Connor, G. F. O'Connor, John O'Connor, Thomas O'Connor, William O'Connor, Christopher O'Connor and James B. O'Connor, Plaintiffs.

No. 34. vs. Equity.

John Slaker, Acting Administrator de bonis non of the Estate of John O'Connor, Deceased, and State of Nebraska, Defendants.

First Count

1. Now come the plaintiffs and show unto the Court that the plaintiffs, Charles O'Connor, Edward O'Connor, Mary L. O'Connor, G. F. O'Connor, Thomas O'Connor, are respectively, citizens of the State of Missouri, residing in Platte County, in said State; that the plaintiff, John O'Connor is a citizen of the State of Oklahoma, residing in the City of Edmond in said State; that the plaintiff William O'Connor, is a citizen of Oklahoma residing in the City of Tulsa in said State; that the plaintiff, Christopher O'Connor, is a citizen of the State of Missouri residing in the City of [of] St. Louis; that the plaintiff, James B. O'Connor is a citizen of the State of Missouri residing in Kansas City, in said State; and, that the defendant, John Slaker is a citizen of the State of Nebraska residing in the City of Hastings, Adams County, in said State, and is and at all times hereinafter mentioned has been the acting Administrator de bonis non of the estate of John O'Connor, deceased, the administration of which estate at all times hereinafter mentioned has been and now is pending in the County Court of Adams County, Nebraska, a Court having Jurisdiction over matters of probate.

2. That this civil proceeding, the object and purpose of which is to establish and have adjudicated the claims of said respective plaintiffs to the estate of said John O'Connor, deceased, as his sole heirs and legatees, and that the matter involved exceeds, exclusive of interest and costs, the sum of $3000.00.

2 3. For their first cause of action plaintiffs allege and state that they were the only children and heirs at law of Charles O'Connor who departed this life intestate on the 13th day of June, 1903, at Edgerton, Platte County, Missouri. That the estate of said Charles O'Connor was duly administered in the Probate Court of said Platte County, Missouri, and that the distribution thereof after the payment of all debts was made to plaintiffs as the sole and only heirs at law and next of kin of said Charles O'Connor.

4. Plaintiffs further state that John O'Connor late of Adams County, Nebraska, departed this life on the 17th day of August, 1913, being at the date of his death and for a long time prior thereto a resident and inhabitant of said Adams County, and at said time he owned a large amount of property, both real and personal in said Adams County, Nebraska, of a value exceeding $125,000.00. Included in said estate was the following described real estate, to-wit: The southwest quarter of Section 27, and the northwest quarter of Section 34, Township 7, Range 9, west, Sixth P. **M.,** in Adams County, Nebraska, and lots 3, 4 and 5 in Block 26 Original Town, now City of Hastings, Adams County, Nebraska.

5. Shortly after the death of said John O'Connor, the defendant John Slaker was appointed administrator de bonis non of said estate by the County Court of said Adams County, Nebraska, and immediately took possession of the assets of said estate, and that he is acting as such administrator at this time and is in possession as such of all the property of said estate. That all debts of said estate have been allowed and paid and said estate is now and for a long time past has been awaiting distribution and is ready for distribution.

6. Plaintiffs further state that said John O'Connor never married and left no descendents and that their father, the said Charles O'Connor of Edgerton, Missouri, was his only brother, the said John O'Connor having no sisters or other kin capable of inheriting from him.

7. Plaintiffs further state that on the 10th day of October, 1908, the said John O'Connor, being of sound mind and disposing memory, executed his last Will and Testament, which, after providing for the payment of just debts and for the erection of a suitable monument to his memory, provided
3 for the disposition and distribution of his estate as follows:

"Third: Having all my life remained single and unmarried and having at this time no wife or children to inherit my property and having no relative now living unless my brother,

Charles O'Connor or his heirs survive me, I hereby dispose of my property and effects as follows, to-wit:

"Fourth: I will bequeath and devise all my property, be it real, personal or mixed, and wherever situate, if he be living to my said brother Charles, and if he be dead, I will, bequeath and devise all my said property to his heirs.

"Fifth: Should my said [reletives] fail to claim under said Will within five years after my death, then and in that event, it is my Will that all my property, be it real, personal or mixed, and wherever situate, go and be used for the purpose of founding an orphanage for homeless children of the State of Nebraska, not including the Cities of Lincoln and Omaha."

Said Will purported to be signed, sealed, published and declared by said John O'Connor and for his Last Will and Testament in the presence of Lawson Tarwater and Stephen H. Turner who subscribed the same in the presence of the said testator and in the presence of each other.

Said Will further was acknowledged by the testator before Grant S. Watkins, as Notary Public within and for the County of Buchanan and State of Missouri.

On the 24th day of November, 1917, and within five years of the death of said John O'Connor said Will was presented to the County Court of Adams County, Nebraska, as the Last Will and Testament of John O'Connor, deceased, by W. H. Lanning who was named therein as executor. Upon the hearing of the evidence in support of the probate of said Will, the Honorable County Judge disallowed, rejected and refused to probate the same, from which plaintiffs duly prosecuted their appeal to the District Court of Adams County, Nebraska. Thereafter, the said W. H. Lanning refused to prosecute the cause further, and the defendant, John Slaker, as acting administrator de bonis non of said estate, contested said Will.

4 8. Plaintiffs further state that a jury being waived by the parties the proceeding for the probate of said Will and the contest thereof was duly tried in the District Court of said Adams County, Nebraska, and a judgment was entered adjudging said Will to be the Last Will and testament of said John O'Connor, deceased. Thereafter, on appeal to the Supreme Court of the [estate] of Nebraska from said Judgment of the District Court, the Supreme Court found as a fact that said Will was a forgery and reversed the judgment of the District Court and affirmed the judgment of the County Court refusing to admit said Will to probate.

9. Thereafter the State of Nebraska instituted a criminal proceeding against the plaintiff James B. O'Connor on the specific charge of uttering a forged Will and upon trial in the District Court of said Adams County, Nebraska, a verdict and judgment of guilty were returned and entered against the said defendant. Afterwards the Supreme Court of Nebraska on appeal of said James B. O'Connor from said judgment reversed said judgment and in the opinion filed determined that because of [aditional] evidence introduced at the trial of said criminal action, the evidence was insufficient to support the charge and that the evidence demonstrated to a mathematical certainty that the said Will was in fact the Last Will and Testament of said John O'Connor.

10. Plaintiffs further state that they are sole devisees and legatees under said Will of said John O'Connor, deceased and as such are entitled to the whole of said estate, both real and personal, each being entitled to a one-tenth share thereof.

Wherefore plaintiffs pray that said Will be adjudged and decreed the Last Will and Testament of the said John O'Connor, deceased; that plaintiffs be adjudged and decreed the sole devisees and legatees under said Will, and that the share of each of said plaintiffs in said estate be declared and adjudged, and that plaintiffs have such other and further [releif] as to the Court may seem proper, the premises considered.

5 Second [County].

For their second and further cause of action plaintiffs adopt as fully as though repeated herein the allegations in the first, second and third paragraphs of the first count of this petition, and allege and state:

1. Plaintiffs were the only children and heirs at law of Charles O'Connor who departed this life intestate on the 13th day of June, 1903, at Edgerton, Platte County, Missouri, the place of his residence. That the estate of said Charles O'Connor was duly administrated in the Probate Court of said Platte County, and that distribution thereof after the payment of all debts was made to plaintiffs as sole and Only heirs at law, and next of kin of said Charles O'Connor.

2. Plaintiffs further state that said John O'Connor late of Adams County, Nebraska, Departed this life on the 17th day of August, 1913, being at the date of his death and for a long time prior thereto a resident and inhabitant of said Adams County, Nebraska, and at said time he owned a large amount of property both real and personal in said Adams County, Nebraska, of a value exceeding $125,000.00. Including in

said estate was the following described real estate, to-wit: The Southwest quarter of Section 27, and the northwest quarter of Section 34, Township 7, North, Range 9 West, Sixth P. M., in Adams County, Nebraska, and Lots 3, 4 and 5 in Block 26 Original Town, Now City of Hastings, Adams County, Nebraska.

3. Immediately after the death of said John O'Connor the defendant, John Slaker was appointed Administrator de bonis non of said estate by the County Court of said Adams County, Nebraska, and immediately took possession of the assets of said estate and that he is acting as such Administrator at this time and is in possession as such of all of the property of said estate. That all debts of said estate have been allowed and paid and said estate is now and for a long time past has been awaiting distribution and is ready for distribution.

6 4. Plaintiffs further state that said John O'Connor never married and left no descendents, and that their father, the said Charles O'Connor of Edgerton, Missouri, was his only brother, the said John O'Connor having no sister or other collateral kin capable of inheriting from him. That plaintiffs are the sole heirs of said John O'Connor deceased and as such are entitled to the whole of said estate, both real and personal, each being entitled to a one-tenth share thereof.

Wherefore plaintiffs pray that they be adjudged the heirs and only heirs of the said John O'Connor, deceased, and that the share of each of said plaintiffs be declared and adjudged and that plaintiffs have such other and further [releif] as to the Court may seem proper, the premises considered.

Third Count.

For their third and further cause of action plaintiffs adopt as fully as though repeated herein the allegations in the first, second and third paragraphs of the first count of this petition, and allege and state that they are the sole heirs at law and legatees of John O'Connor, deceased, and as such are the owners in fee and entitled to the possession of real and personal property of a value exceeding $125,000.00, of which the said John O'Connor died seized and possessed, and which is now in the possession and under the control of the defendant, John Slaker as administrator de bonis non of the estate of the said John O'Connor, deceased. That the real property of which the said John O'Connor died seized is described as follows, to-wit:

The Southwest quarter of Section 27, and the northwest quarter of Section 34, Township 7, north, Range 9 West,

6th P. M., in Adams County, Nebraska; and, lots 3, 4 and 5 in Block 26, Original Town, now City of Hastings, Nebraska, Adams County, Nebraska.

That the said defendants, John Slaker, acting Administrator de bonis non of the estate of John O'Connor, deceased, and State of Nebraska, all and singular claim some title, estate or interest in the subject matter of this petition and in the lands hereinbefore described adverse and prejudicial to the rights, titles and interests of the above named complainants, and each of them, and that such claims asserted by said defendants, are wholly unfounded and invalid in law
7 or equity, and that the assertion depreciates the value of the properties, real and personal in the hands of the said administrator. That the claims of said defendants are, all and singular, without any right whatever, and said defendants and each of them have no estate, right, title or interest whatever in said properties or any part thereof. That the claims of said defendants operate as and constitute a cloud upon the right, title and estate of said complainants in and to said lands and properties.

Wherefore complainants pray that the defendants and each of them may be required to answer and to set forth the grounds and nature of their respective claims and pretentions, and that this court may try, ascertain and determine the estates, title and interest of complainants and defendants of, in and to the properties real and personal herein mentioned, and that it may be adjudged that the claims asserted by said defendants are all and singular unfounded of law or equity, and that the complainants are the sole owners of said properties and entitled to their possession; and complainants further pray that if the Court finds that they or any of them are the owners of the properties, real and personal hereinbefore mentioned, that an order and decree be entered of record forever barring and precluding the defendants and each of them as well as all persons claiming by, through or under said defendants, or any of them, from hereafter setting up any title or claim to said properties, and for all other proper orders and relief as may be just and equitable.

J. M. JOHNSON
BERNARD McNENY
DONALD W. JOHNSON
Attorneys for Complainants.

Filed Mar. 29, 1926, R. C. Hoyt Clerk, By B. F. Rohrer Deputy.

8 (Praecipe for Issuance of Subpoena)

To the Clerk of said Court:

Please issue Subpoena in Chancery for John Slaker acting Administrator de bonis non of the estate of John O'Connor deceased and State of Nebraska. Say to U. S. Marshal to serve the State of Nebraska by leaving Governor and the Attorney General Copies of the Subpoena—John Slaker lives at Hastings, in the above entitled cause.

Dated this 29th day of March 1926.

BERNARD McNENY.

Filed Mar. 29, 1926, R. C. Hoyt Clerk, By B. F. Rohrer Deputy.

(Subpoena in Chancery and Marshal's Return.)

The President of the United States:

To John Slaker, Acting Administrator De Bonis Non of the estate of John O'Connor Deceased et al, and State of Nebraska—Greeting:

You are hereby commanded to be and appear at the office of the Clerk of the District Court of the United States for the District of Nebraska, on or before the twentieth day after service of this writ, at the City of Hastings, Nebraska, then and there to answer the bill of complaint of Charles O'Connor et al. this day filed against you, hence fail not.

Witness, The Honorable, the Judges of the District Court of the United States for the District of Nebraska, this 29th day of March, A. D. 1926.

(Seal)

Issued at my office in the City of Hastings, Nebr. under the Seal of said District Court, the day and year last aforesaid.

R. C. HOYT
Clerk.
By B. F. Rohrer
Deputy.

Memorandum: The above-named defendants to file answer or other defense in this suit in the Clerk's office
9 aforesaid, on or before the twentieth day after the ser-

vice excluding the day thereof, otherwise the bill may be taken pro confesso.

R. C. HOYT
Clerk.
By B. F. Rohrer
Deputy.

("this writ is returnable within twenty days from date of issue)

District of Nebraska,—ss:

I hereby certify and return, that on the 31st day of March 1926 I received this Chancery Subpoena, and on the 1st day of April 1926, I served the same upon the within-named John Slaker, Acting Administrator De Bonis Non of the Estate of John O'Connor, Deceased, at Hastings, Nebraska, in Adams County, State and District of Nebraska, by [delerving] to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the [Dristrict] of Nebraska.
By F. R. Manderville
Deputy United States Marshal.

District of Nebraska:—ss:

I hereby certify and return, that on the 31st day of March, 1926, I received this Chancery Subpoena, and on the 31st day of March, 1926, I served the same upon the within-named State of Nebraska, at Lincoln, in Lancaster County, State, and District of Nebraska, by delivering to and leaving with Adam McMullen a certified copy thereof, with all the indorsements thereon, he being Governor of the State of Nebraska.

D. H. CRONIN
United States Marshal for the District of Nebraska.
By J. C. M-Clung
Deputy United States Marshal.

District of Nebraska,—ss:

I hereby certify and return that on the 31st day of March, 1926, I received this Chancery Subpoena, and on the 31st day of March, 1926, I served the same upon the Withinnamed The State of Nebraska, at Lincoln, in Lancaster County, State and District of Nebraska, by delivering to and leav-

ing with O. S. Spillman a certified copy thereof, with all the indorsements thereon, he being Attorney General for the State of Nebraska.

D. H. CRONIN
United States Marshal for the District of Nebraska

By J. C. M-Clung
Deputy United States Marshal.

Marshals Costs $9.09.

Filed April 12, 1926, R. C. Hoyt Clerk, By B. F. Rohrer Deputy.

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10 (Answer of State of Nebraska.)

I.

This answering defendant reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill makes answer thereto or to so much thereof as it is advised is material to be answered and says:

II.

That as to the matters set forth in paragraph I of the petition or bill of complaint they admit that the defendant, John Slaker is a resident of the City of Hastings in the County of Adams and State of Nebraska, and that he has been for twelve years and is now the acting administrator of the estate of John O'Connor, deceased.

III.

That as to the matters set forth in paragraph 2 of the petition or bill of complaint it admits that this civil proceeding and that the matter involved exceeds, exclusive of interest and costs the sum of Three Thousand ($3000.00) Dollars.

IV.

That as to the matters set forth in paragraph 3 of the petition or bill of complaint it admits the allegations of fact therein contained.

V.

That as to the matters set forth in paragraph 4 of the petition or bill of complaint it admits that John O'Connor departed this life on the 17th day of August, 1917, being at that time and for a long time prior thereto a resident and in-
11 habitant of the said County of Adams, and that at said time he owned a large amount of property in said

County of Adams, a part of said property being the Southwest Quarter of Section 27 and the Northwest Quarter of Section Thirty-four, Township Seven, North Range, Nine, West of the Sixth Principal Meridian.

VI.

That it admits the allegations of fact contained in paragraph 5 of the petition or bill of complaint to be true.

VII.

That as to the matters set forth in paragraph 6 of the petition or bill of complaint, it admits that said John O'Connor never married and that he has no sisters or other kin capable of inheriting from him, but it denies Charles O'Connor, Plaintiff's father was a brother of the said John O'Connor or any kin whatever to him.

VIII.

That as to the matters set forth in paragraph 7 of the petition or bill of complaint it denies that the said John O'Connor on the 16th day of October, 1908, or at any other time made the will in part set forth in said paragraph and alleges that said purported will was a forgery. It admits that an instrument which purported to be the will of the said John O'Connor and which read in part as set forth in paragraph 7 of plaintiff's petition or bill of complaint was presented to the County Court of Adams County for probate and was disallowed, rejected and refused probate in that court.

IX.

That as to the matters set forth in paragraph 8 of the petition or bill of complaint it admits the allegations of facts therein contained to be true.

12 X.

That as to the matters set forth in paragraph 9 of the petition or bill of complaint it admits that the plaintiff herein, James B. O'Connor, was tried and convicted in the district court of Adams County, Nebraska, on the specific charge of uttering a forged will and that said judgment was reversed by the Supreme Court of Nebraska upon the ground that the evidence was insufficient to sustain the conviction, but it denies that the court found or that the opinion stated that the evidence demonstrated that the said instrument purporting to be a will was the last will and testament of John O'Connor, deceased.

XI.

That as to the matter set forth in paragraph 10 of the petition or bill of complaint, it denies that plaintiffs are legatees under the will of John O'Connor deceased, or that they are entitled to any part of his estate.

This answering defendant therefore prays that plaintiff's petition or bill of complaint may be dismissed at plaintiff's costs and that it may have such other and further relief as may be just and equitable.

THE STATE OF NEBRASKA.
By O. S. Spillman
Attorney General.

State of Nebraska
County of Lancaster—ss.

O. S. Spillman, being first duly sworn deposes and says that he has read the above and foregoing answer and knows the contents thereof and that the allegations of fact in said answer contained are true.

O. S. SPILLMAN.

Subscribed in my presence and sworn to before me this 3d day of May, 1926.

(Seal) FRIEDA C. BAYERLEIN.
Notary Public.

Commission expires June 12, 1929.

Filed May 20th, 1926, R. C. Hoyt Clerk, By B. F. Rohrer Deputy.

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13 (Motion of Defendant, John Slaker, Administrator, etc., to dismiss.)

Comes now the defendant, John Slaker, Administrator de bonis non of the Estate of John O'Connor, deceased and moves to dismiss the bill of the plaintiffs herein:—

1. For the reason that the causes of action alleged therein by plaintiffs are barred by the Statute of Limitations;

2. That facts sufficient to constitute a cause of action are not stated in said bill;

3. That the matters alleged in said bill have been fully and finally passed upon and decided by the Supreme Court of the State of Nebraska.

JOHN SLAKER,
Administrator de bonis non of the Estate of John O'Connor, deceased.
By John A. Lawler,
His Attorney.

Filed April 19, 1926, R. C. Hoyt Clerk, By B. F. Rohrer Deputy.

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14 (Opinion and Order of District Court sustaining motion to dismiss.)

October 27, 1926.

In the District Court of the United States for the District of Nebraska Hastings Division.

Charles O'Connor, et al, Plaintiffs,
No. 34. vs. Equity.
John Slaker, Acting Administrator de bonis non, of the estate of John O'Connor, and the State of Nebraska, Defendants.

By the Court: Woodrough, District Judge.

The plaintiffs present their petition against the Administrator, de bonis non of the estate of John O'Connor, deceased, and the State of Nebraska, in three separate numbered counts.

In the first count they say they are entitled to the estate of the [decdent] because their father, who died intestate, was the sole legatee and devisee under the last will of John O'Connor. They set out the will in this count and although they admit that it was held to be a forgery and denied probate by final judgment of the Court of probate entered upon the mandate of the Supreme Court of Nebraska after full hearing of the merits, they claim there is other and further evidence than the evidence considered by the Supreme Court and that they have [the] to re-offer the will and to take the property under it.

In the second count they claim the property because they are the sole heirs, and next of kin of John O'Connor deceased.

In the third count they say that the administrator and the State of Nebraska are wrongfully claiming some right, title and interest to the property, and they ask an adjudication against such claims and a decree forever barring the same.

The State and the Administrator move to dismiss for want of jurisdiction over the subject matter, and it seems clear to me that this court is entirely without jurisdiction.

15 By the constitution of Nebraska its probate courts are given exclusive "Original jurisdiction in all matter of probate settlement of estates of deceased persons, and in such proceedings to find [and] heirship"; (Section 16, Article 5, Neb. constitution.) and Section 1261, ch. 15, Art, 11, comp. Stat. Neb. 1922, provides: "No Will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed in the Court of probate".

Following these provisions of the constitution and laws of Nebraska the Supreme Court of the State held as early as 1882 in Loosemore vs. Smith, 12 Neb 343, that the Courts of general original jurisidction in the state have no original jurisdiction to set aside a will or the probate of the same, and this upon grounds which would, a fortiori, deny the jurisdiction of such courts to validate or enforce a will or distribute property according to its terms without probate in an original action. Such has been the universally accepted understanding of our State law. The petition admits that the administration of the estate is pending in the proper probate court, and even if it be a fact, as alleged in plaintiffs petition, that all debts are paid and it pends [merly] for distribution, that Court alone has power to carry out the functions assigned to it.

The plaintiffs have cited and urged the case of Byers vs. McAuley, 149 U. S. 608 as a precedent in favor of the jurisdiction, but I consider the opinion of the Supreme Court of the United States in the later case of Sutton vs English, 246 U. S. 119 conclusive against the plaintiffs.

It Is Therefore Ordered that the petition be dismissed for want of jurisdiction. The Clerk will enter order accordingly.

By The Court

J. W. WOODROUGH
Judge.

Filed Oct. 27, 1926, R. C. Hoyt, Clerk, By B. F. Rohrer Deputy.

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16 Assignment Of Errors.

Come now Charles O'Connor, Edward O'Connor, Mary L. O'Connor, P. S. O'Connor, G. F. O'Connor, John O'Connor, Christopher and James B. O'Connor, plaintiffs in

the above entitled cause and say that the order and decree rendered on the 27th day of October, 1926, sustaining the demurrer to plaintiffs' petition and each count thereof and dismissing said petition for want of jurisdiction was and is erroneous and against their just rights for the following reasons:

1. Because the Court erred in holding that it had no jurisdiction of the cause of action pleaded in the first count of plaintiffs' petition.

2. Because the Court erred in holding that it had no jurisdiction of the cause of action pleaded in the second count of plaintiffs' petition.

3. Because the Court erred in holding that it had no jurisdiction of the cause of action pleaded in the third count of plaintiffs' petition.

4. Because the Court erred in dismissing plaintiffs' petition and each count thereof for want of jurisdiction.

5. Because the Court erred in holding that it had no
17 jurisdiction to entertain an action for the distribution of the estate, it appearing from the allegations of the petition that the administration of the estate in probate has been completed, all debts have been paid, and nothing remains but distribution.

6. Because the Court erred in holding as a matter of law that the first count sought was in the nature of an action to probate a will.

7. Because the Court erred in holding as a matter of law that the decision and judgment of the Supreme Court of Nebraska disallowing the Will was res adjudicata.

JAMES M. JOHNSON
and BERNARD McNENY
Attorneys for Plaintiffs.

Filed in U. S. District Court on December 11, 1926.

[16½] (Notice of Hearing of Motion to Dismiss.)

To John Slaker, Administrator De Bonis Non Of The Estate Of John O'Connor, Deceased:

Please take notice that on Monday August 2nd, 1926, at the hour of two o'clock P. M. the above named defendants and each of them, will call up for hearing the motion to dismiss heretofore filed in the above entitled cause before his

Honor J. W. Woodrough, Judge of the United States District Court for the District of Nebraska, in his chambers in the postoffice building in the City of Omaha, Nebraska, at which time plaintiffs and each of them will ask that said motion be overruled.

CHARLES O'CONNOR, EDWARD O'CONNOR, MARY L. O'CONNOR, P. S. O'CONNOR, G. F. O'CONNOR, WILLIAM O'CONNOR, THOMAS O'CONNOR, JOHN O'CONNOR, CHRISTOPHER O'CONNOR, and JAMES B. O'CONNOR.
By James M. Johnson. and Bernard McNeny.
Their Attorneys.

The above named defendant John Slaker, Administrator de bonis non of the estate of John O'Connor, deceased, hereby acknowledges receipt of the above notice and copy of the same this 26th day of July, 1926.

JOHN SLAKER,
Administrator de bonis non of the estate of John O'Connor,
By John A. Lawler
His Attorney.

Filed July 28, 1926 R. C. Hoyt Clerk By B. F. Rohrer Deputy.

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18 Application For Appeal.

Comes now Charles O'Connor, Edward O'Connor, Mary L. O'Connor, P. S. O'Connor, G. F. O'Connor, John O'Connor, Christopher O'Connor, and James B. O'Connor, plaintiffs in the above entitled cause, feeling themselves aggrieved by the decree rendered and entered in the above entitled cause on the 27th day of October, 1926, do hereby appeal from said decree to the United States Circuit Court of Appeals for the 8th Circuit for the reasons specified in the assignment filed herewith, and pray that their said appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 8th Circuit, sitting at St. Louis, Missouri, under the rules of said Court of Appeals in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them to protect their appeal be made, and desiring to supersede the execution of said decree, your petitioners here tender bond in such amount as the Court may require for such purpose and pray that with the allowance of the appeal a supersedeas be issued.

JAMES M. JOHNSON
and BERNARD McNENY
Attorney for Plaintiffs.

Appeal allowed upon the giving of a bond in the sum of $500.00

J. W. WOODROUGH
United States District Judge

Filed Dec. 11, 1926, R. C. Hoyt Clerk, By B. F. Rohrer Deputy.

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19 Order Allowing Appeal.

This day comes Charles O'Connor, Edward O'Connor, Mary L. O'Connor, P. S. O'Connor, G. F. O'Connor, John O'Connor, Christopher O'Connor and James B. O'Connor, plaintiffs in the above entitled cause and presented their application for an appeal and an assignment of errors accompanying the same, which application upon consideration of the Court is hereby allowed, and the Court allows an appeal herein to the United States Circuit Court of Appeals for the 8th Circuit upon the filing of a bond in the sum of $500.00 with good and sufficient security to be approved by this Court, and when approved and filed shall operate to stay and supersede the execution of the judgment, order and decree rendered and entered in this cause on the 27th day of October 1926.

And it is further ordered that a transcript of the record, proceedings, papers and exhibits upon which said decree was rendered duly authenticated be sent to the United States Circuit Court of Appeals for the 8th Circuit.

And it is further ordered that the transcript of the record be filed in the United States Circuit Court of Appeals for the 8th Circuit on or before sixty days from the 10th day of December, 1926.

J. W. WOODROUGH
Judge of the United States District Court.

Filed Dec. 11, 1926, R. C. Hoyt, Clerk, By B. F. Rohrer Deputy.

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20 (Citation and Admission of Service.)

In The District Court Of The United States For The District Of Nebraska, Hastings Division.

Charles O'Connor, et al, Plaintiffs,
No. 34. vs. Equity
John Slaker, Administrator de bonis non of the estate of John O'Connor, and the State of Nebraska, Defendants.

The President of the United States to the above named John Slaker, Acting Administrator de bonis non of the estate of John O'Connor, and the State of Nebraska, Defendants, and John A. Lawler and . . . . . , their attorneys, —Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the 8th Circuit, to be held in the City of St. Louis in the State of Missouri within sixty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Nebraska, Hastings Division, wherein Charles O'Connor, et al, are plaintiffs and John Slaker, acting administrator de bonis non of the estate of John O'Connor and the State of Nebraska are defendants to show cause if any there be why the judgment, order and decree entered in said cause in such appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable J. W. Woodrough, Judge of the United States District Court for the District of Nebraska, Hastings Division, this 10th day of December, 1926.

J. W. WOODROUGH

Service of the within citation and receipt of copy thereof admitted and acknowledged this 14th day of December, 1926, service of the Marshal being waived.

JOHN A. LAWLER
O. S. SPILLMAN
Attorneys for Defendants.

The acceptance of O. S. Spillman Atty. General of State of Nebraska was made December 22, 1926.

Filed in U. S. District Court on December 24, 1926.

21 **Appeal Bond.**

Know All Men By These Presents That we, Charles O'Connor, Edward O'Connor, Mary L. O'Connor, P. S. O'Connor, G. F. O'Connor, John O'Connor, Christopher O'Connor, and James B. O'Connor, as principals and J. W. Auld, as security, are held and firmly bound unto John Slaker, Acting Administrator de bonis non of the estate of John O'Connor, and the State of Nebraska, in the sum of $500.00, for the payment of which we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such that, Whereas Charles O'Connor, Edward O'Connor, Mary L. O'Connor, P. S. O'Connor, G. F. O'Connor, John O'Connor, Christopher O'Connor, and James B. O'Connor, appellants in the above entitled cause, have prosecuted an appeal to the United States Circuit Court of Appeals for the 8th Circuit to reverse the decree rendered and entered in said cause in the District Court of the United States for the District of Nebraska, Hastings Division, on the 27th day of October, 1926.

Now, Therefore, if said appellants shall prosecute said appeal with diligence and shall answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

Charles O'Connor, CHAS. O'CONNOR
Edward O'Connor, G. F. O'CONNOR
Mary L. O'Connor,
P. S. O'Connor, J. W. AULD.
G. F. O'Connor,
John O'Connor,
Christopher O'Connor,
James B. O'Connor,
By Bernard McNeny,
Their Attorney.

22 The foregoing bond is approved this 29th day of January, 1927.

THOS. C. MUNGER
United States District Judge

State of Nebr.
Webster County—ss.

J. W. Auld being first duly sworn on his oath says he is a resident of Webster County, Nebraska and is worth the sum of One Hundred Thousand Dollars above debts and exemptions.

J. W. AULD.

Subscribed in my presence and sworn to before me this 26th day of Jan. 1927,

(Seal) EMMA BERGMAN
Notary Public

Filed at 8:30 A. M. Jan. 31, 1926, R. C. Hoyt Clerk, By B. F. Rohrer Deputy.

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23 Praecipe For Transcript Of The Record.

To The Clerk:

You will please incorporate as a part of the transcript of the record in the above entitled cause the following:

1. Petition or bill of Complaint by plaintiffs.
2. Summons and Marshal's return.
3. Answer of defendant, State of Nebraska.
4. Demurrer filed by the defendant Slaker.
5. Motions to dismiss filed by the defendant Slaker.
6. The Opinion of the Court filed October 27th, 1926, and the decree and order entered thereon.
7. Application for appeal and order thereon.
8. Assignment of errors.
9. Citations.
10. Appeal Bond.
11. All orders and sipulations which may be entered or filed hereafter extending the time to file the transcript of the record in the Court of Appeals.

J. M. JOHNSON.
and BERNARD McNENY.
Attorneys for Plaintiffs.

We acknowledge receipt of a copy of the above praecipe for transcript of the record in the above entitled case. John A. Lawler, Attorney for John Slaker, acting administrator, of the estate of John O'Connor.

Jan. 31, 1927,

O. S. SPILLMAN
Attorney for the State of Nebraska.

Filed Feb. 4th, 1927, R. C. Hoyt Clerk, By B. F. Rohrer Deputy.

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24 (Clerk's Certificate to Transcript.)

United States of America
State of Nebraska
Hastings, Division, —ss.

In obedience to the command of the within writ, I hereby transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all the things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the District Court of the United States for the District of Nebraska, Hastings, Division, at Hastings, this 4th, day of February, A. D. 1927.

Seal
U. S. Dist. Court
Dist. of Neb.
Hastings Div.

R. C. HOYT
Clerk.
By B. F. Rohrer
Deputy Clerk.
of the District Court of the United States for the District of Nebraska Hastings, Division.

Filed Feb. 26, 1927. E. E. Koch, Clerk.

In United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1927

No. 7767

Charles O'Connor et al., Appellants,

vs.

John Slaker, Acting Administrator, etc., et al., Appellees

Appeal from the District Court of the United States for the District of Nebraska

Mr. James M. Johnson, Mr. Bernard McNeny and Mr. Donald W. Johnson submitted brief for appellants.

Mr. P. E. Boslaugh (Mr. O. S. Spillman and Mr. George Ayres were with him on the brief) for appellee, State of Nebraska.

Mr. John A. Lawler for appellee, John Slaker, Administrator.

Before Kenyon, Circuit Judge, and Molyneaux and John B. Sandborn, District Judges

Opinion—Filed Oct. 10, 1927

Kenyon, Circuit Judge, delivered the opinion of the court.

This is an appeal from an order and judgment of the District Court of the United States for the District of Nebraska dismissing upon motion a petition of appellants. The petition is in three counts. In the first appellants claim they are entitled to the estate of John O'Connor, deceased, by virtue of a will bequeathing the same to one Charles O'Connor and in case of his death to his heirs; that he died intestate and that they are his heirs at law; that appellee, John Slaker, is administrator de bonis non of said estate, and is in possession of all the property of the same, including the real property described in the petition; that said will was contested and it was held by the Supreme Court of Nebraska to be a forgery; that James B. O'Connor, one of the appellants, was tried and convicted

in the District Court of Adams County, Nebraska, for the alleged forgery, which judgment was reversed by the Supreme Court of Nebraska, said Court stating that the evidence showed the will to be the last will of John O'Connor.

It is asked that the will be adjudged the last will and testament of said John O'Connor, and that plaintiffs be decreed to be the sole devisees and legatees under the same.

The second count is not predicated on any will, but on the alleged fact that plaintiffs are the sole and only heirs at law of the said John O'Connor, deceased, and therefore entitled to inherit his property.

The third count asks that title be quieted as against the administrator and the State of Nebraska to the real estate left by the said John O'Connor, and that title thereto be adjudged and confirmed in appellants as the sole heirs of the said John O'Connor, deceased. The only relief asked as to the State of Nebraska is set forth in the third count.

The Court sustained the motion to dismiss the bill on the ground that sole jurisdiction over the causes of action was in the State courts.

It is the claim of appellees that the County Court of Nebraska has exclusive original jurisdiction in the matters of probate and administration, and that the right to determine the heirs of a deceased person is vested solely in that court; that matters of the character presented by appellants are not within the ordinary equity jurisdiction of the Federal Courts.

The relief asked in Count 1 is in effect the probate of an alleged will which had been adjudicated in the State Court to be a forgery. This cannot be done in the Federal Court. Matters purely of a probate character, which includes, of course, proceedings to probate wills, are not within the jurisdiction of the Federal Courts.

clearly on this subject. In Ellis, et al., v. Davis, 109 U.

The Supreme Court of the United States has spoken

S. 485, 497, the Court said: "The original probate, of course, is mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in almost all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being

contested between parties, can arise until preliminary probate has been first made." In Farrell v. O'Brien, 199 U. S. 89, 110, it was said: "That, as the authority to make wills is derived from the state and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States."

In Sutton v. English, 246 U. S. 199, it was held that a suit which was in the nature of one to annul a will and which under the state law is merely supplemental to proceedings for probate and cognizable only by the Probate Court is not within the jurisdiction of the District Court of the United States. We quote (p. 205) therefrom:

"By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the Federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a state, by statute or custom, gives to parties interested the right to bring an action or suit inter partes, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but that this relates only to independent suits and not to procedure merely incidental or ancillary to the probate; and further, that questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the Federal courts where diversity of citizenship exists and the requisite amount is in controversy."

See also 21 Corpus Juris, page 121; 25 Corpus Juris, page 695. The action of the Court as to Count 1 was correct.

The question presented as to Count 2 is entirely different. It is there assumed that no will was made by John O'Con-

nor, and it is asked that appellants be adjudicated his heirs at law and their share in the estate be determined. The right to have such question determined in the Federal Court (requisite diversity of citizenship existing and the required amount being in controversy) has been settled by the Supreme Court of the United States. Nor can such right be destroyed by any action of a State. It is a creation of the Constitution of the United States. In Byers v. McAuley, 149 U. S. 608, 620, it is said:

"A citizen of another State may establish a debt against the estate. Yonley v. Lavender, 21 Wall. 276; Hess v. Reynolds, 113 U. S. 73. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. Yonley v. Lavender, supra. In like manner a distributee, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, Payne v. Hook, supra; or against any other parties subject to liability, Borer v. Chapman, supra; or in any way which does not disturb the possession of the property by the state court."

In the leading case of Waterman v. Canal Louisiana Bank Co., 215 U. S. 33, 43, the Court discusses various cases coming before the courts of the United States for the purpose of determining the rights of persons claiming an interest in estates, and considers to what extent the jurisdiction in equity of the courts of the United States may be effected by State statutes, and says, page 43:

"The general rule to be deduced from them is that, inasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that insofar as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts, which is like unto the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789, the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters. This court has

uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees and heirs to establish their claims and have a proper execution of the trust as to them."

The Court points out that the United States courts, while they may make decrees binding upon the parties, cannot seize and control the property if it is in the hands of a State court, and referring to Farrell v. O'Brien, supra, says page 44:

"That case recognized what previous cases had held, that in proceedings purely of a probate character there was no jurisdiction in the Federal courts. This was in harmony with the rule theretofore laid down in Byers v. McAuley, supra, in which it was held that the Federal court could not exercise original jurisdiction to draw to itself the entire settlement of the estate of the decedent and the accounts of administration, or the power to determine all claims against the estate. But it was there decided that a Circuit Court of the United States could entertain jurisdiction in favor of citizens of other States to determine and award by decrees binding in personam their shares in the estates."

In McClellan v. Carland, 217 U. S. 268, the Court refers to the Waterman v. Canal-Louisiana Bank Co. case, supra, and says:

"In that case following previous decisions of this court, it was held that the chancery jurisdiction of the Federal courts to entertain suits between citizens of different States to determine interests in estates, and to have the same fixed and declared, having existed from the beginning of the Federal Government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England, could not be impaired by subsequent state legislation creating courts of probate."

It is apparent that the Supreme Court of the United States has many times held that the Federal Courts have jurisdiction of such causes of action as are stated in Count 2.

What we have said as to Count 2 applies also to the relief asked in Count 3, with perhaps some qualification.

Another question is presented as to Count 3, to which we now direct our attention. Relief is there asked as to the State of Nebraska in the nature of quieting title in appellants against any claim of the State. The alleged interest of the State in the property of John O'Connor, deceased, is based on section 5686 of the Compiled Statutes of Nebraska for 1922, which provides that upon failure of heirs "title shall vest at once in the state, without an inquest or other proceedings in the nature of office found," and the State claims that the property has passed to it and its title can only be divested by a finding of heirship by the County Court of Adams County, Nebraska.

The State of Nebraska raises in this Court for the first time the question that the case could not be brought against the State on account of the Eleventh Amendment to the Constitution of the United States relative to a suit against a State by citizens of another State. Orderly procedure would have required the raising of this jurisdictional question in the trial Court. However we must notice it, Mansfield, Coldwater & Lake Michigan Railway Co., et al., v. Swan, et al., 111 U. S. 379, for of course if the trial Court had no jurisdiction it could not decide the case as to the State of Nebraska, even if the parties had consented that it be there brought. Chicago, Burlington & Quincy Railway Co. v. Willard, 220 U. S. 413. This we think is the only question of any doubt in this case. We have been favored with no brief on the subject by appellant, doubtless because the question did not make its appearance until the brief of appellee, State of Nebraska, was filed.

It is elemental that a sovereignty cannot be sued without its consent, and "with the exception named in the Constitution every State has absolute immunity from suit." Hopkins v. Clemson College, 221 U. S. 636; Carr v. United States, 98 U. S. 433; United States v. Lee, 106 U. S. 196; Cunningham v. Macon & Brunswick R. R. Co., 109 U. S. 446; Hagood & Others v. Southern, et al., 117 U. S. 52; In re Ayers, 123 U. S. 443; Hans v. Louisiana, 134 U. S. 1; Belknap v. Schild, 161 U. S. 10; Smith v. Reeves, 178 U. S. 436; Lankford v. Platte Iron Works, 235 U. S. 461; Hertz et al., v. Knudson, 6 F. (2d) 812.

The consent of a State to be sued by a citizen of another State must be granted by express legislative authority. United States v. Lee, 106 U. S. 196; Chandler v. Dix, 194 U. S. 590; Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 94.

Such consent may be limited to the State's own courts, and if so limited, its immunity from suit in a Federal Court is not thereby waived. It is within the State's discretion as to whether it will permit itself to be sued by a private individual, and if so in what tribunals. Beers v. State of Arkansas, 20 How. 527; Smith v. Reeves, 178 U. S. 436; Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151; Interstate Constr. Co. v. Regents of the University of Idaho, 199 Fed. 509; Deseret Water, Oil & Irr. Co. v. State of California, 202 Fed. 498.

Nebraska has to some extent waived its prerogative as to immunity from suit. Section 22, Article 5 of its Constitution provides that the State may sue and be sued, and that the Legislature shall provide by law in what manner and in what courts suits shall be brought. This provision is not self executing, and to be effective requires action of the Legislature. Section 1100 Comp. Stat. Neb. 1922 authorizes certain classes of suits against the State to be brought in the District Courts of the State. See as bearing thereon section 1106 of the Code of Civil Procedure. We find no statute, however, of Nebraska expressly consenting in terms that the State may be sued in the Federal courts by a citizen of another State. A complexity arises, however, by reason of the appearance in the suit of the Attorney General of the State in behalf of the State.

This phase of the case is difficult to deal with. Notice of this suit was served upon the Attorney General and on the Governor of the State. The Attorney General filed an answer for the State of Nebraska, signed and verified by him, consisting of eleven paragraphs, some admitting and some denying claims of the petition, and asking that the bill be dismissed.

The jurisdiction of the court was not challenged in any way. The motion filed by appellee, Slaker, to dismiss the bill was sustained. A brief is now submitted in this Court, signed by the Attorney General who filed answer for the

State in the trial Court, in which it is argued that the appearance of the Attorney General in the case was not a consent on the part of the State to be sued, and it is urged in said brief that the case of McShane v. Murray, (Neb.) 184 N. W. 147, is decisive of the question. This presents a situation somewhat novel.

The immunity of a State from suit may be waived by the voluntary appearance of the State and submission to the jurisdiction and decision of the court of a matter in controversy if the subject is properly one that can be determined by such court. It does not confer jurisdiction where none exists. In discussing this question the Supreme Court in Clark v. Barnard, 108 U. S. 436, said:

"We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. The immunity from suit belonging to a State which is respected and protected by the Constitution in the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in the suit otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, these courts are always open to it as a suitor in controversies between it and citizens of other States. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title."

In Hertz, et al., v. Knudson, 6 F. (2d) 812, this Court while holding that the District Court is given no jurisdiction of controversies between the State and citizens of different States upon the ground of diversity of citizenship, also discussed the immunity of a State from suit under the Eleventh Amendment, and said, page 816:

"It has been uniformly held under this amendment that a state cannot be made a defendant in a federal court against its consent, but that the privilege may be waived if the state sees fit voluntarily to submit itself to the jurisdiction."

In Gunter v. Atlantic Coast Line, 200 U. S. 273, it was held that the immunity of the State could be waived and that if it voluntarily becomes a party to a cause and submits its rights for judicial determination it will be bound thereby. In that case the Attorney General filed answer for the State of South Carolina. The Attorney General was by the statutes of the State authorized to appear for the State. It was held that the prohibitions of the Eleventh Amendment do not relate to the power of a Federal court to administer relief in cases where jurisdiction as to a State and its officers has been acquired as the result of the voluntary action of the State in submitting its rights to judicial determination.

In Pruett v. Starr, 188 U. S. 284, the Court said:

"Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."

See also State v. Kennedy, (Neb.) 83 N. W. 87; State v. Mortensen, (Neb.) 95 N. W. 831, 834; Interstate Constr. Co. v. Regents of the University of Idaho, 199 Fed. 509; Deseret Water, Oil & Irr. Co. v. State of California, 202 Fed. 498.

Whether or not the appearance of the Attorney General for the State in this case amounts to a voluntary appearance by the State depends upon the authority of the Attorney General. Neither he nor any other State officer can waive the immunity of a State in the absence of a statute authorizing it to be done, and if his appearance for the State was in excess of the power vested in him by law it would not constitute a voluntary submission by the State to the jurisdiction of the Court. Hagood & Others v. South-

ern, 117 U. S. 52; Stanley v. Schwalby, 162 U. S. 255; Railroad Tax Cases, 136 Fed. 233.

The Attorney General of Nebraska has been given broad powers by the Legislature of the State. See Article 2, Comp. Stat. of Neb. 1922. His department is constituted an executive one with power to control the legal affairs of the State, and he is authorized to appear for the State and defendant in any court any cause or matter in which the State may be a party, or interested. His powers and duties have been the subject of numerous decisions of the Supreme Court of the State, in a number of which the Court has stated that the general control of actions in which the State is interested is in his hands, and that he is the general law officer of the State. State v. Fremont, E. & M. V. R. Co., (Neb.) 35 N. W. 119; Paxton v. State, (Neb.) 81 N. W. 383; State v. Pacific Express Co., (Neb.) 115 N. W. 619; In re Creighton's Estate, (Neb.) 136 N. W. 1001; Follmer v. State, (Neb.) 142 N. W. 908, 910; Lower v. State, (Neb.) 184 N. W. 174, 175. Nevertheless that Court has held in McShane v. Murray, 106 Neb. 512, 184 N. W. 147, that the immunity of a State from suit is not waived by the voluntary appearance of the Attorney General. We quote from the syllabus:

"Where by its constitution the state is immune from suits against it except as the legislature otherwise provides, the immunity thus provided cannot be waived by a voluntary general appearance in the case and a participation in the trial thereof upon its merits by the Attorney General in an unauthorized action brought against the State."

In the opinion it is said:

"Of course, if the plaintiff had no authority or legal right to make the state a party to this action or maintain this suit against it, the voluntary appearance of the Attorney General in behalf of the State and his failure to object to the jurisdiction of the court over the State did not, and could not, in any wise bind the State so as to make the decree rendered against it of any validity."

And in Palmer v. State of Ohio, 248 U. S. 32, it was held that the right of individuals to sue a State in either Fed-

eral or State courts can not be derived from the Constitution or laws of the United States; that it must come from the consent of the State; and whether or not the required consent to be sued has been given by the Constitution or laws of a State must be determined as a question of local State law, as to which the decision of the State Supreme Court is controlling.

In Stanley v. Schwalby, 162 U. S. 255, 270, the Court said:

"The United States by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a state in any case. Neither the Secretary of War nor the Attorney General, nor subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers."

While the language of the statutes of Nebraska on the subject is not clear, and while broad power is given the Attorney General thereby, yet in view of the holdings of the Supreme Court of the State we are satisfied that the Attorney General has not been granted authority by the Legislature of Nebraska to appear in suits of this nature against the State in the Federal courts and consent to a waiver of the immunity of the State from suit. This case being within the category of suits against a State, and the immunity from suit in the Federal court not having been waived, the trial court was without jurisdiction in the case as to the State of Nebraska, and as to it the order of dismissal was right. Farish v. State Banking Board, 235 U. S. 498; Deseret Water, Oil & Irr. Co. v. State of California, 202 Fed. 498; Hertz, et al., v. Knudson, 6 F. (2d) 812.

The State also takes the position that, while it cannot be made a party to this suit in the Federal court, it is an indispensable party to the action; that the other appellee is a mere nominal party, and hence the case cannot proceed, but should be dismissed, not only as to it but as to the other appellee. The result of sustaining such position would be to force appellants to try in the State court an

issue which we hold is cognizable in equity in the Federal Court. Of course, it is equitable doctrine not to determine a suit without presence of the parties really affected by the decree. Minnesota v. Northern Securities Co., 184 U. S. 199. It is also well settled that a State is not a citizen under the Judiciary Acts of the United States relating to suits by citizens of different states. Ames v. Kansas, 111 U. S. 449; Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482; Hertz et al. v. Knudson, 6 F. (2d) 812; Utah Const. Co. v. State Highway Commission of Wyo., 16 F. (2d) 322.

We are not convinced however that the State of Nebraska is an indispensable party to this action. It has no title whatever in the property claimed by appellants if they are in fact the heirs at law of John O'Connor. No title vests in the State unless there is failure of heirs. The question of heirship can be determined in the Federal Court without the presence of the State as a party and it is for the State to determine whether it will interplead and try that question there, or risk whatever the effect might be of a decision of the said Federal Court on this question in an action between appellants and the other appellee.

The dismissal of the case as to appellee, State of Nebraska, and of Count 1 as to both appellees, was not erroneous. The order of dismissal as to Counts 2 and 3 as to appellee, John Slaker, was erroneous, and is reversed and the case remanded for further proceedings.

Reversed and Remanded.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

DECREE—Oct. 24, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court in this cause dismissing the petition

as to the appellee, State of Nebraska, and of Count One thereof as to both appellees, John Slaker, Acting Administrator de bonus non of the estate of John O'Connor, and the State of Nebraska, be, and the same is hereby, affirmed, and that said order of dismissal as to Counts Two and Three as to the appellee, John Slaker, Acting Administrator de bonus non of the estate of John O'Connor, be, and the same is hereby, reversed with costs; and that Charles O'Connor, Edward O'Connor, John O'Connor, P. S. O'Connor, G. F. O'Connor, John O'Connor, Christopher O'Connor and James B. O'Connor have and recover against John Slaker, Acting Administrator de bonus non of the estate of John O'Connor, the sum of Ninety and 75 100 Dollars for their costs in this behalf expended, to be collected according to law.

It is further ordered that this cause, be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

In United States Circuit Court of Appeals

Order Allowing Appeal—Filed Jan. 5, 1928

It is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered in the above entitled case, be, and the same is hereby allowed and that certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of $500.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated January 5, 1928.

Wm. S. Kenyon, Judge United States Circuit Court of Appeals, Eighth Circuit.

In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed—Filed Feb. 20, 1928

Now comes appellant John Slaker, administrator de bonis non of the estate of John O'Connor, deceased, and makes this statement of the points upon which he intends to rely, being the same points set forth in the assignment of error heretofore filed.

1

The United States Circuit Court of Appeals, Eighth Circuit, erred in holding that the constitution and laws of the State of Nebraska which give to the county courts of Nebraska exclusive and original jurisdiction in matters of probate and administration are null, void and of no effect insofar as the federal authority and jurisdiction of such matters are concerned.

2

The United States Circuit Court of Appeals, Eighth Circuit, erred in holding that Section 1129, Compiled Statutes of Nebraska 1922, and Article 5, Section 16, of the Constitution of Nebraska, which give to the county courts of Nebraska exclusive original jurisdiction in all matters of probate and administration, and to determine an adjudicated heirship, are null, void, and of no effect insofar as the federal authority and jurisdiction over such matters is concerned.

3

The United States Circuit Court of Appeals, Eighth Circuit, erred in holding that Section 1129, Compiled Statutes, Nebraska, 1922, which gives to the county courts of Nebraska exclusive jurisdiction in all matters of probate and to determine and adjudicate heirship is null, void and of no effect insofar as the federal authority and jurisdiction over such matters is concerned.

4

The United States Circuit Court of Appeals, Eighth Circuit, erred in holding that the federal courts have jurisdiction to determine questions of heirship not granted by law

or custom to any court of general jurisdiction in the State of Nebraska.

5

The United States Circuit Court of Appeals, Eighth Circuit, erred in holding that the federal courts have jurisdiction to adjudicate heirs at law.

6

The United States Circuit Court of Appeals, Eighth Circuit, erred in that its decree violates the established doctrine of comity between courts.

7

The United States Circuit Court of Appeals, Eighth Circuit, erred in its decree which disturbs the actual possession, by a court of competent jurisdiction, of the property of the estate involved herein.

8

The United States Circuit Court of Appeals, Eighth Circuit, erred in holding and deciding that the order of the District Court sustaining appellant's motion as to the second count of the petition herein was erroneous.

9

The United States Circuit Court of Appeals, Eighth Circuit, erred in holding and deciding that the order of the District Court sustaining appellant's motion as to the third count of the petition herein was erroneous.

John Slaker, Administrator de Bonis Non of the Estate of John O'Connor, Deceased, Appellant, by John A. Lawler, His Solicitor.

The clerk of the Supreme Court will please print the following parts of the record which appellant thinks necessary for the consideration of the points upon which he intends to rely:

1. Paragraphs 1, 2 and 3, and counts 2 and 3 of the petition.

2. Motion of defendant John Slaker, administrator, etc., to dismiss.

3. Opinion and order of the District Court sustaining motion to dismiss.

4. Opinion and order of United States Circuit Court of Appeals, Eighth Circuit.

5. Any other parts of the record which may be required by law or the rule of the court.

John Slaker, Administrator de Bonis Non of the Estate of John O'Connor, Deceased, Appellant, by John A. Lawler, His Solicitor.

Service of the within statement of the points on which appellant intends to rely and of the parts of the record for which he asks consideration admitted and acknowledged this 15th day of February, 1928.

J. M. Johnson and Bernard McNeny, Attorneys for Appellees.

(File endorsement omitted.)

Endorsed on cover: File No. 33,197. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 61. John Slaker, administrator de bonis non of the estate of John O'Connor, deceased, appellant, vs. Charles O'Connor, Edward O'Connor, Mary L. O'Connor, et al. Filed Feb. 4th, 1928. File No. 33,197.